Supreme Court, U. S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1760

STATE OF OREGON, *Petitioner,*

v.

GARY LEE FONDREN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

LARRY O. GILDEA
J. P. GRAFF

LARRY O. GILDEA, P.C.
342 East 12th Avenue
Eugene, Oregon 97401
Telephone: (503) 342-1771
Attorneys for Respondent

Table of Contents

Page

Constitutional Provisions 1

Questions Presented 2

Statement of the Case 2

Reasons Why the Writ Should be Denied 4

1. It is Not Clear Whether the Oregon Supreme Court Decided this Case Under the State Constitution or the Federal Constitution 4
2. There is Only One Issue in This Case, and It is Not Sufficiently Important to Warrant This Court's Attention 5
3. The Allegedly Conflicting Decisions on Which Petitioner Relies Are Distinguishable on Their Facts 6

Conclusion 10

Table of Authorities

Cases

Cardwell v. Lewis, 417 US 583 (1974) 7

Carroll v. United States, 267 US 132 (1925) 10

Chambers v. Maroney, 399 US 42 (1970) 6

Commonwealth v. Holzer, 480 Pa 93, 389 A2d 101 (1978) .. 9

Coolidge v. New Hampshire, 403 US 443 (1971) 10

State v. Florance, 270 Or 169, 527 P2d 1202 (1974) 4

State v. Flores, 250 Or 273, 570 P2d 965 (1977) 4

State v. Fondren, 285 Or 361, 591 P2d 1374 (1979) 5

Page

State v. Greene, 285 Or 337, 591 P2d 1362 (1979) 4

United States v. Abascal, 564 F2d 821 (9th Cir 1977) cert. den. sub nom. *Abascal v. United States*, 435 US 953 (1978) 8

United States v. Ramirez, 513 F2d 72 (5th Cir 1975), cert. den. sub nom. *Ramirez v. United States*, 423 US 912 (1975) 8

Constitutional Provisions

United States Constitution, Amendment IV 1

United States Constitution, Amendment XIV 2

Constitution of Oregon, Article I, Section 9 2

In The

Supreme Court of the United States

October Term, 1978

No. 78-1760

STATE OF OREGON, *Petitioner,*

v.

GARY LEE FONDREN, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OREGON

Respondent's Brief in Opposition

The respondent, Gary Lee Fondren, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Oregon Supreme Court's opinion in this case, reported at 285 Or 361, 591 P2d 1374 (1979).

Respondent accepts petitioner's statement of the opinion below and of the basis of this Court's jurisdiction.

Constitutional Provisions

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

United States Constitution, Amendment XIV, § 1:

". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law . . ."

Constitution of Oregon, Article I, Section 9:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Questions Presented

1. Did the Oregon Supreme Court decide this case under the Fourth Amendment of the United States Constitution, as applied to the States by the Fourteenth Amendment, or under Article I, Section 9 of the Oregon Constitution?

2. Were exigent circumstances present which justified the warrantless seizure of respondent's vehicle from an employe parking lot upon probable cause?

Statement of the Case

Respondent accepts petitioner's statement of the general background of the case and the manner in which the federal question, if there is one, was presented. The chronology of events on July 22, 1976 may be fixed more accurately, however, than appears from petitioner's statement of the facts.

Between 6:30 and 7:30 that evening, police officer Meier received information at his home in Bend, Oregon, from a confidential reliable informant that some marijuana was contained in the trunk of a vehicle driven by respondent and presently located in the employe parking lot of the Brooks-Willamette particle board manufacturing plant, where respondent was working. (Tr. 3). Within thirty to forty-five minutes, the officer observed the car on the lot. (Tr. 5, 22). He went to the police station where he verified registration details and checked for arrest records and background information on respondent. (Tr. 5). Within forty-five minutes after

receiving the tip, the officer had acquired and confirmed all the information that he in fact used to obtain a search warrant the next day. (Tr. 22).

The officer next spoke to his watch commander about possible courses of action. (Tr. 6, 17-18). He knew from previous experience that it took from one and one-half to four hours to obtain a search warrant. (Tr. 9, 24). Officer Meier believed from the information given to him that respondent was working the swing shift at the Brooks-Willamette plant. (Tr. 25). He learned from another officer that the swing shift ended at midnight. (Tr. 6). They considered applying for a warrant and the alternatives if a judge could not be found to sign one. (Tr. 18). One of the alternatives discussed was the action ultimately taken – seizing the car without a warrant if respondent refused to consent to a search and immobilizing it until a warrant could be obtained. (Tr. 17). Officer Meier also spoke to a deputy district attorney about courses of action probably during this period but possibly as early as between 6:30 and 7:30. (Tr. 14).

No attempt was made to apply for a warrant at this time. Instead, the officer returned to the parking lot and at 8:45 observed the car a second time. (Tr. 6, 18). He did not keep the vehicle under surveillance, post a guard or return to the police station to prepare an affidavit. Instead, he did some "additional checking" on the respondent. (Tr. 19).

Officer Meier returned to the police station between 10:00 and 10:30 P.M. and started to prepare an affidavit for a warrant. (Tr. 6). He decided there was not enough time to get one before respondent's shift ended, so he returned to the Brooks-Willamette plant, spoke to respondent, indicated the police had information that there was marijuana in the trunk of respondent's vehicle, and asked for consent to search the vehicle in the parking lot. (Tr. 6-7). When respondent refused, officer Meier told him the car would be seized and held until a warrant could be obtained. (Tr. 7). Respondent went inside. (Tr. 7). Sometime between 11:30 and 11:45 the car was towed to the police garage, where it was stored overnight until a search warrant was obtained the next day.

Reasons Why the Writ Should be Denied

1. It is Not Clear Whether the Oregon Supreme Court Decided this Case Under the State Constitution or the Federal Constitution.

The present case was one of four automobile search and seizure cases consolidated for review by the Oregon Supreme Court. In the leading case, *State v. Greene,* 285 Or 337, 591 P2d 1362 (1979), the court discussed general principles governing automobile searches and seizures in an effort to clarify Oregon law in this area. The court, in deciding the present case, relied upon its discussion in *Greene.*

In *Greene,* the defendant invoked Article I, Section 9 of the Oregon Constitution as well as the Fourth and Fourteenth Amendments of the United States Constitution. On two prior occasions the Oregon Supreme Court has held that in the area of vehicle search and seizure the Oregon Constitution affords no more protection that the federal Constitution. *State v. Florance,* 270 Or 169, 527 P2d 1202 (1974); *State v. Flores,* 250 Or 273, 570 P2d 965 (1977). It so held again in *Greene* and declined to depart from analyses developed in the decisions of this Court.

Justices Linde and Lent, specially concurring in the result, described the procedure adopted below as one of

> "... looking directly to the decisions of the United States Supreme Court and then 'adopting' them to deal with each particular case. As a result, we sometimes do not know what the law in Oregon is until the United States Supreme Court tells us." *State v. Greene,* supra, 285 Or at 349.

In view of this tradition, respondent in the present case did not rely upon any provision of the Oregon Constitution in challenging the warrantless seizure of his automobile. Nevertheless, to the extent to which the court below adopted federal constitutional standards governing automobile searches and seizures in *State v. Greene,* made them part of Oregon law under Article I, Section 9 of the Oregon Constitution, applied the discussion in *Greene* to the facts of the present case, and found no exigent circumstances present here, it is unclear

whether the decision below was based on the federal or the state constitution.

2. There is Only One Issue in This Case, and It is Not Sufficiently Important to Warrant This Court's Attention.

The Supreme Court of Oregon, reversing the Oregon Court of Appeals, ruled that the warrantless seizure of respondent's automobile was justified under federal, and hence state, constitutional standards only if exigent circumstances were present. It found from the record before it that such circumstances were not present. Petitioner does not challenge the constitutional premises of the court's analysis, but only its factual finding that exigent circumstances were not present.

It is clear from the opinion below that the court carefully considered the evidence before it on the issue of exigency. Officer Meier's testimony establishes that there were at least four hours within which to apply for a search warrant before respondent's vehicle was likely to be removed from the parking lot. It would take no more than four hours to obtain a warrant. Police did not think it likely the vehicle would be removed before midnight as no steps were taken to prevent its removal earlier in the evening. Shortly after acquiring all the information that was needed and that was in fact used the next day to establish probable cause, the police reviewed alternatives open to them. These included seizing and searching the car pursuant to a warrant and seizing the car without a warrant shortly before respondent's shift ended and holding it overnight until a warrant could be obtained. Further investigation was unnecessary to establish probable cause for obtaining a warrant, so there was no reasonable justification for the delay in applying for a warrant. Under such circumstances, it would appear that police inactivity was itself a primary factor contributing to any exigencies that may have existed at 11:30. As the court below stated, "The officer cannot create exigent circumstances by his own inaction." *State v. Fondren,* supra, 285 Or at 367.

The question presented on this record is not, as petitioner's second question suggests, whether police must act to obtain

a warrant immediately upon acquiring the probable cause. It is, rather, whether the state may invoke the exigent circumstances exception to the warrant requirement to justify a warrantless seizure of a parked automobile from an employe parking lot upon information that marijuana was contained in its trunk when police intended to search the vehicle, they knew there was little likelihood that it would be removed within the time needed to obtain a warrant, there was ample opportunity to submit the issue of probable cause to a magistrate, police delayed in applying for a warrant until it was probably too late to obtain one, there was no reasonable justification for the delay and the driver subsequently refused to consent to a search. The court below considered this question fully and decided it correctly upon the basis of the record before it.

3. The Allegedly Conflicting Decisions on Which Petitioner Relies Are Distinguishable on Their Facts.

Petitioner contends the decision below conflicts with two decisions of this Court and three decisions of federal and state courts. Each of the cases cited is distinguishable on its facts from the present case, however.

In *Chambers v. Maroney,* 399 US 42 (1970), a moving vehicle suspected of involvement in a robbery was stopped on the roadside at night, the occupants arrested and the car seized and taken to the police station where it was subsequently searched. Both the seizure and subsequent search were warrantless. The seizure was upheld on the grounds that exigent circumstances existed at the time of the initial stop and in those circumstances police may do one of two things: conduct an immediate roadside search or seize the vehicle and conduct a reasonably prompt warrantless search at the station. In dictum, the Court stated that a third alternative open to the police is to seize the vehicle and hold it until a warrant is obtained. Even here, however, exigent circumstances must be present to justify the seizure.

In *Chambers,* the stop occurred within an hour after police acquired probable cause. The exigent circumstances which justified the seizure were that the car was moving, it was late at night, its occupants were alerted to police interest, and the

car was pulled over in a parking lot where it was impractical and perhaps unsafe to conduct a search. None of those factors is found in the present case. Furthermore, there was no issue of police delay in *Chambers* as there is here.

In *Cardwell v. Lewis,* 417 US 583 (1974), police wished to examine the exterior surfaces of respondent's vehicle. They had probable cause to conduct such a search several hours before they arrested respondent and seized his vehicle from a commercial parking lot. Following his arrest, police overheard respondent instruct his attorneys to ask his wife to drive the car home. Shortly thereafter the car was removed from the commercial lot to a police lot, where its exterior was examined. A plurality of this Court held that exigent circumstances existed at the time of seizure – namely, the likelihood that respondent's wife would remove the car from the parking lot before a warrant could be obtained. The principle announced in *Chambers* therefore justified an examination of the vehicle's exterior in the commercial lot or its seizure and a reasonably prompt search thereafter. Furthermore, since the search was limited to an examination of the car's exterior, it did not infringe any expectation of respondent's privacy.[1]

The plurality observed that where probable cause previously exists the reasonableness of seizing a car *under exigent circumstances* is not foreclosed by failure to obtain a warrant at the first practical moment. 417 US at 595. This observation, however, was made in a case where police failure to act in no way contributed to any exigent circumstances present at the time of seizure.

In the present case, of course, police wished to search an interior portion of respondent's automobile, not its surface.

---

[1] The plurality was careful to remark:

"This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion . . ."

"In the present case, nothing from the interior of the car and no personal effects which the Fourth Amendment has traditionally been deemed to protect, were searched or seized and introduced in evidence." 417 US at 591.

Such a search would infringe upon his expectation of privacy. Furthermore, the court below expressly found that no exigent circumstances existed at the time of seizure. Even though it was late at night, the police were prepared to search the car in the parking lot with respondent's consent. Finally, police knew that the vehicle would be driven away from the parking lot at a certain time. Hence, here, unlike in *Cardwell,* delay in applying for a warrant by itself contributed to conditions, if any, making it impracticable to get one.

In *United States v. Ramirez,* 513 F2d 72 (5th Cir 1975), cert. den. sub nom. *Ramirez v. United States,* 423 US 912 (1975), undercover government agents had arranged to purchase and take delivery of a quantity of marijuana from defendants at a prearranged location in four days' time. A few hours before delivery, the agent in charge decided the delivery spot was inappropriate for a nighttime operation. Other agents, acting according to his instructions, subsequently located the truck carrying the marijuana parked at a service station, arrested the occupants and conducted a warrantless search on the spot.

Defendants contended that the search was invalid because the agents, having had probable cause to search for four days, had foregone a genuine opportunity to get a warrant. The court rejected this contention, finding that no genuine opportunity was missed. The agents' original intent was to obtain evidence that defendants were distributing marijuana, not to search the truck. They changed their intent only one and one-half hours before the search, when there was no longer time to apply for a warrant. The court stated:

> "[T]here is no requirement, constitutional or otherwise, that in order to validate unforeseen possible searches law enforcement officials must obtain search warrants when the operation being conducted does not contemplate a search." 513 F2d at 75.

The present case is distinguishable from *Ramirez* in that the sole object of the police operation was to search respondent's vehicle and a genuine opportunity to obtain a warrant existed.

The present case may also be distinguished from the *United States v. Abascal,* 564 F2d (9th Cir 1977), cert. den. sub nom.

Abascal v. United States, 435 US 953 (1978). In the course of investigating another incident, narcotic agents learned from a reliable informant that defendant's automobile, then parked at his home, contained a quantity of LSD. They placed his home and automobile under surveillance. A woman who left the residence was placed under surveillance, but she eluded the police, returned to defendant's residence, attempted to flee in his automobile, and was stopped a few blocks away where the car was searched without a warrant. Citing *Cardwell v. Lewis,* the court rejected defendant's contention that once probable cause to search arose police could not evade the warrant requirement by simply awaiting the arrival of exigent circumstances. It pointed out that whether or not the informant's tip constituted probable cause, the woman's attempt to flee with defendant's car gave police abundant probable cause to search the vehicle, and a moving vehicle containing an occupant alerted to police interest is the classic case of exigent circumstances. 564 F2d at 828-29.

While no rule requires officers to strike the instant they have probable cause, as noted in *Abascal,* police delay in obtaining a warrant in no way gave rise to the exigent circumstances which justified the search there. Any delay in applying for a warrant was clearly due to the requirements of an ongoing investigation of the activities of the defendant and the occupants of his dwelling. The same was not true here.

The final case cited by petitioner is *Commonwealth v. Holzer,* 480 Pa 93, 389 A2d 101 (1978). Police seized defendant's automobile, parked on a public street, several hours after his arrest for murder. At the time of the seizure, they knew an alleged co-conspirator was still at large and defendant's family and girl friend lived in the area where the automobile was found. The court rejected defendant's challenge to the warrantless seizure on two grounds: (1) warrantless seizure of an automobile following the driver's arrest is less constitutionally offensive than it might otherwise be since the driver suffers no inconvenience from its immobilization; and (2) the possibility of removal of the car from the area by defendant's alleged co-conspirator, girl friend or members of his family constituted sufficiently exigent circumstances to justify seizure.

In the present case, respondent was not in custody, so seizure of the automobile was a more substantial intrusion upon his privacy expectations than in *Holzer.* Furthermore, police had no reason to believe that the automobile would be removed within the time required for obtaining a warrant.

Conclusion

The decision of the Supreme Court requires police to observe a warrant requirement before seizing a vehicle from a parking lot open to public view when they have probable cause to search it, the object of their operation is to search it, they know that there is no reasonable likelihood of its removal within the time required to apply for and obtain a warrant, and there is time and assurance enough to obtain one beforehand. Far from expanding the warrant requirement or conflicting with decisions of this or other federal or state courts, this decision is consistent with constitutional standards announced by this Court in *Carroll v. United States,* 267 US 132 (1925), *Chambers v. Maroney,* supra, and *Coolidge v. New Hampshire,* 403 US 443, 458-464 (1971). Therefore, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

LARRY O. GILDEA
J. P. GRAFF

LARRY O. GILDEA, P.C.
342 East 12th Avenue
Eugene, Oregon 97401
Telephone: (503) 342-1771
Attorneys for Respondent